

No. 19-55882

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RICHARD N. BELL,

Plaintiff-Appellant,

v.

WILMOTT STORAGE SERVICES, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 2:18-cv-07328-CBM-MRW
Hon. Consuelo B. Marshall, United States District Judge

**EXCERPTS OF RECORD
VOLUME I OF II
(Pages 1 to 9)**

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 RICHARD N. BELL

12 Plaintiff,

13 vs.

14 WILMOTT STORAGE SERVICES,
15 LLC and IADVANTAGE, LLC.

16 Defendants.

Case No.: CV 18-7328-CBM-MRWx

**ORDER RE: CROSS-MOTIONS
FOR SUMMARY JUDGMENT
[DKT. NOS. 29, 42]**

17 The matters before the Court are: (1) Plaintiff Richard N. Bell's ("Plaintiff")
18 Motion for Summary Judgment on Defendant Wilmott Storage Services, LLC's
19 Liability for Copyright Infringement (Dkt. No. 29); and (2) Defendant Wilmott
20 Storage Services, LLC's ("Wilmott") Motion for Summary Judgment (Dkt. No.
21 42).¹

22 **I. BACKGROUND**

23 This lawsuit arises from Wilmott's alleged infringement of Plaintiff's
24 copyrighted photograph of the Indianapolis skyline ("Indianapolis Photograph").
25 (Dkt. No. 34, First Amended Complaint ("FAC") ¶ 8; Ex. B.) Plaintiff, a
26

27
28 ¹ To date, Wilmott's co-defendant IAdvantage, LLC has neither answered
Plaintiff's FAC nor joined Wilmott's Motion for Summary Judgment.

1 professional photographer and retired attorney, took the Indianapolis Photograph
2 in March of 2000. (FAC ¶¶ 1, 8.) On August 4, 2011, Plaintiff registered the
3 Indianapolis Photograph with the United States Copyright Office. (Bell Decl. ¶ 8.)
4 The United States Copyright Office issued Plaintiff a certificate of registration,
5 Registration No. VA 1-785-115, with an effective date of registration of August 4,
6 2011 and the date of first publication of August 29, 2000. (*Id.* ¶ 8, Ex. D.)
7 Thereafter, Plaintiff began licensing digital downloads of the Indianapolis
8 Photograph through “Webshots” and his personal website. (*Id.* ¶ 7, Ex. C.)

9 On April 5, 2018, using Google Images, Plaintiff discovered the
10 Indianapolis Photograph on Wilmott’s web server, accessible at the URL
11 <http://www.visitusa.com/images/states/alabama/cities/mobile/park.jpg>. (*Id.*, Ex.
12 E.) Plaintiff declares that Wilmott’s website did not credit Plaintiff as the
13 photographer or otherwise disclose the true source of the Indianapolis Photograph.
14 (*Id.* ¶ 11.) Plaintiff further declares that the website necessarily implied that
15 Wilmott owned the copyright in the Indianapolis Photograph by displaying the
16 notice “Copyright © 2014 Visit USA. All Rights Reserved” on its site. (*Id.*) It is
17 undisputed that Plaintiff never licensed or otherwise gave permission to Wilmott
18 to use the Indianapolis Photograph. (*Id.* ¶ 15.)

19 Upon discovering the unauthorized presence of the Indianapolis
20 Photograph, Plaintiff viewed the index of images on Wilmott’s server to determine
21 how long it had been there. (*Id.* ¶ 17.) The index shows that a file titled
22 “park_yyy.jpg,” which Plaintiff declares is the same photograph (*id.* ¶ 18), was last
23 modified on December 23, 2014, as were all other files in the same location (*id.* ¶
24 19, Ex. F). Thus, according to Plaintiff, Wilmott must have infringed his
25 reproduction, distribution, and display rights in the Indianapolis Photograph as of
26 December 23, 2014 by displaying the photograph on Wilmott’s website.

27 According to Wilmott, there is no evidence that the Indianapolis Photograph
28 appeared on a webpage of its website. (Dkt. No. 37-2, Declaration of Jonathan

1 Tullo (“Tullo Decl.”) ¶¶ 5-10.) Rather, Wilmott maintains that the evidence only
 2 shows that the photograph resided on its website server as a dormant “.jpg” file as
 3 of December 24, 2014. (Dkt. No. 37-1, Declaration of Jeffrey Goeson (“Goeson
 4 Decl.”) ¶¶ 7, 10.) Wilmott explains that the only place where there was access to
 5 the Indianapolis Photograph was through the pinpoint URL, either
 6 <http://www.visitusa.com/images/states/alabama/cities/mobile/park.jpg> or
 7 http://www.visitusa.com/images/states/alabama/cities/mobile/park_yyy.jpg.
 8 (Goeson Decl. ¶¶ 8-11.) Wilmott further explains that because Google never
 9 indexed the Indianapolis Photograph, the public could only access the image if
 10 they knew the exact pinpoint URLs above or if they already had a digital copy of
 11 the image upon conducting an image search. (Tullo Decl. ¶¶ 6-10; Goeson Decl.
 12 ¶¶ 9-11.)

13 Although it is undisputed the Indianapolis Photograph resided on Wilmott’s
 14 website server, Wilmott moves for summary judgment arguing that it cannot be
 15 held liable for copyright infringement as its use was *de minimis* as a matter of law.
 16 (Dkt. No. 47 at 9-12.)

17 II. LEGAL STANDARD

18 On a motion for summary judgment, the Court must determine whether,
 19 viewing the evidence in the light most favorable to the nonmoving party, there are
 20 any genuine issues of material fact. *Simo v. Union of Needletrades, Indus. &*
 21 *Textile Employees*, 322 F.3d 602, 609-10 (9th Cir. 2003); Fed. R. Civ. P. 56.
 22 Summary judgment against a party is appropriate when the pleadings, depositions,
 23 answers to interrogatories, and admissions on file, together with the affidavits, if
 24 any, show that there is no genuine issue as to any material fact and that the moving
 25 party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. An issue is
 26 “genuine” only if there is a sufficient evidentiary basis on which a reasonable jury
 27 could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
 28 242, 248 (1986). A factual dispute is “material” only if it might affect the outcome

1 of the suit under governing law. *Id.* The evidence presented by the parties must be
2 admissible. Fed. R. Civ. P. 56(e). In judging evidence at the summary judgment
3 stage, the Court does not make credibility determinations or weigh conflicting
4 evidence. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630
5 (9th Cir. 1987). Rather, “[t]he evidence of the nonmovant is to be believed, and
6 all justifiable inferences are to be drawn in [the nonmovant's] favor.” *Anderson*,
7 477 U.S. at 255. But the non-moving party must come forward with more than
8 “the mere existence of a scintilla of evidence.” *Id.* at 252. “Conclusory,
9 speculative testimony in affidavits and moving papers is insufficient to raise
10 genuine issues of fact and defeat summary judgment.” *Soremekun v. Thrifty*
11 *Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (citations omitted).

12 III. DISCUSSION

13 Wilmott does not dispute that the Indianapolis Photograph was copied onto
14 its webserver. Instead, Wilmott argues that there is no evidence that the
15 Indianapolis Photograph appeared on a webpage of its website, and thus, the mere
16 copying of the photograph to the server was *de minimis* and not actionable under
17 the Copyright Act.

18 The Ninth Circuit has explained the concept of *de minimis* copying under
19 the Copyright Act as follows: “For an unauthorized use of a copyrighted work to
20 be actionable, the use must be significant enough to constitute infringement.... This
21 means that even where the fact of copying is conceded, no legal consequences will
22 follow from that fact unless the copying is substantial.” *Newton v. Diamond*, 388
23 F.3d 1189, 1192–1193 (9th Cir. 2004) (citing *Ringgold v. Black Entm’t Television,*
24 *Inc.*, 126 F.3d 70, 74-75 (2d Cir. 1997)). A use is *de minimis* and therefore not
25 “substantial” enough to be actionable “only if it is so meager and fragmentary that
26 the average audience would not recognize the appropriation.” *Newton*, 388 F.3d at
27 1193 (quoting *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986)). In making
28 this determination, courts must consider both the quantitative and qualitative

1 significance of the copied portion relative to the plaintiff's work as a whole. *Id.* at
2 1195.

3 Plaintiff argues that Wilmott's copying cannot be *de minimis* as a matter of
4 law because Wilmott copied the entire Indianapolis Photograph onto its server
5 and, thus, "there is no question that the average audience member^[2] would
6 recognize Wilmott's appropriation" of the photograph. (Dkt. No. 47 at 4-5.)
7 However, the cases discussing *de minimis* use also focus on the substantial or
8 insubstantial "use" of the copyrighted material. *See Newton*, 388 F.3d 1189,
9 1192–1193 ("For an unauthorized use of a copyrighted work to be actionable, the
10 *use* must be significant enough to constitute infringement.") (emphasis added).
11 Wilmott argues that the evidence only shows that the Indianapolis Photograph
12 resided as a dormant ".jpg" file on its webserver and that there is no evidence that
13 the photograph appeared on its website. As such, Wilmott contends that its "use"
14 was so qualitatively insignificant that its infringement is not actionable.³ In
15 support, Wilmott relies primarily on the Second Circuit's decision in
16 *Knickerbocker Toy Co. v. Azrak-Hamway Int'l, Inc.*, 668 F.2d 699, 703 (2d Cir.
17 1982).

18 In *Knickerbocker*, the plaintiff toy company sued its competitor for
19 copyright infringement based on the use of a copyrighted photograph of plaintiff's
20 toy car on a promotional "blister" card. *Id.* at 701. There, while the blister card
21 featured copy related to defendant's product, it also featured the copyrighted
22

23 ² It is unclear what "audience" Plaintiff is referring to by this assertion. Based on
24 the evidence before the Court, Wilmott's only audience was the audience of its
25 website, and there is no evidence that this audience would have seen any portion
26 of Plaintiff's picture, let alone enough of the picture to recognize it.

27 ³ Indeed, given the undisputed evidence that Wilmott never knew the Photograph
28 was on the webserver (Dkt. No. 37-2, Tullo Decl. ¶ 4), and its belief that the
photograph must have existed on the server at the time Wilmott acquired it in 2012
(*id.* ¶ 8), to say that Wilmott "used" the Photograph at all seems to stretch the term
"use" beyond its limits.

1 photograph of plaintiff's toy car. *Id.* at 702. The plaintiff only learned of the
2 alleged infringement on the blister card through litigation discovery. *Id.* The
3 defendant explained that the allegedly infringing blister card was "simply a
4 sample which [defendant] had produced in order to position the artwork, and that a
5 totally different illustration would be used for the production run of the card." *Id.*
6 The district court dismissed plaintiff's copyright claim, finding that the blister card
7 "was only an office copy which was never used." *Id.* The Second Circuit
8 affirmed, holding that "the copyright claim with respect to the blister card falls
9 squarely within the principle of *de minimis non curat lex*." *Id.* at 703.

10 The Court agrees with Wilmott that the Indianapolis Photograph merely
11 existing as a dormant resource file on its webserver, without probative evidence
12 that it was displayed on a webpage of its website, is analogous to the infringing
13 blister card merely being used as an office copy in *Knickerbocker*.⁴ The Court
14 finds the distinction between a photograph appearing on a webpage and a
15 photograph residing on a webserver to be significant. In *Perfect 10, Inc. v.*
16 *Amazon.com, Inc.*, the Ninth Circuit adopted the "server test," which provides that
17 "a computer owner that stores an image as electronic information *and serves the*
18 *electronic information directly to the user ... is displaying the electronic*
19 *information in violation of a copyright holder's exclusive display right.*" 508 F.3d
20 1146, 1159 (9th Cir. 2007) (emphasis added).

21 While it is undisputed that Wilmott stored the Indianapolis Photograph on
22 its webserver, there is no evidence that Wilmott communicated the photograph to
23 any end user other than Plaintiff (but that communication was initiated by Plaintiff
24 himself, who has the right to authorize display of the Photograph). Indeed, it is
25 undisputed that Google never indexed the photograph (Goeson Decl. ¶ 4), and that
26

27 ⁴ Indeed, the alleged infringement in this case is even less substantial than in
28 *Knickerbocker*, since Wilmott—having no idea the Photograph was on its server
(Tullo Decl. ¶ 4)—did not even make *internal* use of the Photograph.

1 members of the public could only locate the Indianapolis Photograph if (1) they
2 already had a digital copy of the photograph upon conducting an image search or
3 (2) they happened to type into their browsers the exact pinpoint URLs
4 <http://www.visitusa.com/images/states/alabama/cities/mobile/park.jpg> or
5 http://www.visitusa.com/images/states/alabama/cities/mobile/park_yyy.jpg. (Tullo
6 Decl. ¶¶ 6-10; Goeson Decl. ¶¶ 8-11.) Further, Wilmott’s expert declares that the
7 “park_yyy.jpg” file was damaged, and therefore, would not have been used on a
8 webpage because it could not be viewable. (Goeson Decl. ¶ 10.) Plaintiff has not
9 provided any evidence that any member of the public saw the Indianapolis
10 Photograph on a webpage of Wilmott’s website. As Wilmott’s expert explains, “if
11 a webpage does not instruct the server to place an image on the webpage, it simply
12 stays dormant on the server.” (Goeson Decl. ¶¶ 8-9.) Therefore, like the office
13 copy in *Knickerbocker*, the undisputed evidence supports Wilmott’s position that
14 the Indianapolis Photograph was never seen by anyone other than Plaintiff, and
15 thus, Wilmott’s infringement is not actionable.

16 To prove Wilmott infringed his “display” right, Plaintiff submits a
17 screenshot of the purported webpage containing the Indianapolis Photograph,
18 which has the URL “<http://www.visitusa.com/images/states>
19 [/alabama/cities/mobile/park.jpg](http://www.visitusa.com/images/states/alabama/cities/mobile/park.jpg).” (Bell Decl. ¶ 9, Ex. E.) Plaintiff’s contention
20 that this evidence proves Wilmott “displayed” the photograph on a webpage
21 apparently reflects Plaintiff’s misunderstanding of the terms “webpage” and
22 “website.” Exhibit E does not show a URL for a webpage or a website, but rather
23 a URL for an image resource file. An image resource file is only considered part
24 of a website or webpage if it is related to a hypertext file from the site. *See, e.g.*,
25 American Heritage Dictionary (5th ed. 2019) (defining “webpage” as “[a]
26 document on the World Wide Web, consisting of a *hypertext file* and any *related*
27 *files* for scripts and graphics”) (emphasis added); *id.* (defining a “website” as “[a]
28 set of interconnected *webpages*”) (emphasis added). Plaintiff has not identified

1 any hypertext file to which the copyrighted photograph relates, so it is inaccurate
2 to refer to Exhibit E as proving the photograph was “displayed” on a “webpage”
3 or part of a “website.” Even when construed in the light most favorable to
4 Plaintiff, Exhibit E shows nothing more than what Wilmott already concedes: that
5 the Indianapolis Photograph was present on Wilmott’s webserver, accessible to
6 those who already have a digital copy of the Photograph.

7 Summary judgment on *de minimis* use is appropriate where the undisputed
8 facts show that the copying was not significant enough to constitute infringement.
9 *See Newton*, 388 F.3d at 1196. The Court finds the Ninth Circuit’s most recent
10 decision on this issue, *Design Data Corp. v. Unigate Enter., Inc.*, 847 F.3d 1169
11 (9th Cir. 2017), instructive. In *Design Data*, the Ninth Circuit reversed the district
12 court’s finding of *de minimis* use, holding that “the evidence raise[d] a material
13 question of fact precluding summary judgment on the unauthorized download
14 claim.” 847 F.3d at 1172. There, the defendant claimed that it downloaded a “free
15 demo” of the copyrighted software, was unaware that the copy it downloaded was
16 unauthorized, and that it did not actually use the software. *Id.* However, there
17 was also evidence showing that the plaintiff did not make “free demos” of the
18 software available for download, that defendant intentionally downloaded a
19 complete copy of the software, and that defendant possessed three “patch files”
20 allowing circumvention of the software’s licensing requirement. *Id.* In addition,
21 the defendant’s computers contained files generated by the software and
22 defendant’s website advertised that it used the software. *Id.* The Ninth Circuit
23 concluded that “this evidence raised a factual question whether [defendant’s]
24 download was more than an ‘insignificant violation []’ of [plaintiff’s] copyright.”
25 *Id.* (citing *Ringgold*, 126 F.3d at 74).

26 Unlike the defendant in *Design Data*, here, Wilmott was unaware that the
27 Indianapolis Photograph resided on its webserver before Plaintiff contacted it on
28 April 7, 2018. (Tullo Decl. ¶ 4.) Moreover, Wilmott did not “display” the

1 photograph on a webpage of its website and there is no evidence that Wilmott
 2 otherwise “used” the photograph. As such, the evidence before the Court fails to
 3 raise a material question of fact that would preclude summary judgment. The
 4 Court finds that the copy of the Indianapolis Photograph residing on Wilmott’s
 5 webserver—absent any evidence that Wilmott otherwise reproduced, distributed,
 6 or displayed the photograph—amounts to at most a *de minimis*, “technical”
 7 violation that is not actionable as a matter of law. Therefore, the Court **GRANTS**
 8 Wilmott’s motion for summary judgment on its *de minimis* use defense.⁵

9 **IV. CONCLUSION**

10 Accordingly, the Court **GRANTS** Wilmott’s motion for summary judgment
 11 on its *de minimis* use defense. The Court **DENIES** Plaintiff’s motion for summary
 12 judgment on Wilmott’s liability because Wilmott’s infringement is not actionable.
 13

14 **IT IS SO ORDERED.**

15
 16 DATED: July 1, 2019



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CONSUELO B. MARSHALL
 19 UNITED STATES DISTRICT JUDGE
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⁵ In its motion, Wilmott alternatively moved for summary judgment on its statute
 27 of limitations and fair use defenses. Because the Court concludes that Wilmott
 28 prevails on its *de minimis* use defense, the Court does not address Wilmott’s
 additional arguments.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing EXCERPTS OF RECORD: VOLUME I with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Date: December 9, 2019

Respectfully submitted,

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